



February 14, 2018

The Honorable Charles E. Grassley  
Chairman  
United States Senate  
Committee on the Judiciary  
135 Hart Senate Office Building  
Washington, D.C. 20510

The Honorable Dianne Feinstein  
Ranking Member  
United States Senate  
Committee on the Judiciary  
331 Hart Senate Office Building  
Washington, D.C. 20510

**Re: The Sentencing Reform and Corrections Act of 2017**

Dear Chairman Grassley and Ranking Member Feinstein:

On behalf of the NAACP Legal Defense and Educational Fund, Inc. (“LDF”), we welcome the Senate Judiciary Committee’s consideration of the Sentencing Reform and Corrections Act of 2017, S. 1917 (SRCA), a bipartisan effort to enact a law that contains several promising provisions that could result in fairer sentencing and corrections policies. While SRCA is an important first step in reforming a justice system still plagued with racial inequities, LDF urges you to also pass comprehensive criminal justice laws that will improve the system at every stage.

Since its founding in 1940, LDF has used litigation, policy advocacy, public education, and community organizing strategies to achieve racial justice and equity in the areas of education, economic justice, political participation, and criminal justice. Throughout its history, LDF has consistently worked to promote criminal and juvenile justice laws and policies that are administered fairly and without regard to race, from police stops<sup>1</sup> to sentencing<sup>2</sup> to reentry.<sup>3</sup>

The Committee’s consideration of SCRA is a long-awaited effort to reform federal laws that have resulted in the mass incarceration of far too many persons, disproportionately person of color, for far too long at great economic and social costs. The imposition of mandatory minimum sentences has had a significant impact on the federal

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<sup>1</sup> See, e.g., Complaint, *Davis, et al. v. City of New York, et al.*, Case No. 1:10-cv-00699-SAS-HBP (S.D.N.Y Jan. 28, 2010) (challenging the unlawful stop, questioning and arrest of African-American and Latino public housing residents and their guests by New York City Police Department officers), *available at* <http://www.naacpldf.org/update/courtapproves-final-settlement-federal-class-action-lawsuit-challenging-police-practices-nyc>.

<sup>2</sup> See, e.g., *Buck v. Davis*, 137 S. Ct. 759 (2017) (ruling in favor of a new sentencing hearing for LDF client Duane Buck after concluding that Mr. Buck received ineffective assistance of counsel when his attorney introduced racially-biased testimony in his capital sentencing hearing).

<sup>3</sup> See, e.g., LDF Statement on President Obama’s Actions to Promote Rehabilitation and Reintegration of Persons with Criminal Records (Nov. 3, 2015), *available at* <http://www.naacpldf.org/press-release/ldf-statement-president-obama’s-actions-promote-rehabilitation-and-reintegration-perso>.

prison population, with more than half of federal prisoners serving time for offenses carrying a mandatory minimum penalty.<sup>4</sup> Persons convicted of drug trafficking offenses account for two-thirds of those serving mandatory minimum sentences; and, 29.7% of individuals receiving these penalties are African American,<sup>5</sup> even though African Americans comprise only 13% of the general population. After these individuals have paid their debt to society and are released from prison, discriminatory policies and practices often prevent them from accessing employment, housing, voting and other opportunities because of their criminal records.<sup>6</sup>

LDF supports several provisions in SRCA detailed below that address inequities in federal sentencing and promote rehabilitation and re-entry for persons who are incarcerated. We also suggest improvements to the bill and the passage of additional laws that will result in comprehensive criminal justice reforms.

## **I. Retroactivity of the Fair Sentencing Act of 2010**

LDF strongly supports the bill's affirmation that the Fair Sentencing Act of 2010 ("FSA"), which reduced the disparity between crack and cocaine sentences, applies retroactively to persons sentenced prior to the passage of the law. We have consistently argued in litigation that the FSA already applies retroactively,<sup>7</sup> and we are pleased that the bill settles the debate. The FSA's retroactive application will help ameliorate the glaring racial imbalances produced by the 100:1 sentencing disparity between individuals convicted of crack and powder cocaine offenses. While the FSA's reduction of the sentencing disparity to 18:1 was a substantial step in the right direction, any disparity is wholly unjustifiable. LDF urges Congress to eliminate the remaining 18:1 crack and powder cocaine disparity.

## **II. Expansion of the safety valve**

LDF supports expansion of the categories of persons who are relieved of mandatory sentences because they fall within the federal safety valve. Persons with up to four criminal history points would be eligible if they do not have certain prior convictions. Judges also may find persons eligible if disqualifying convictions over-represent the seriousness of the criminal history or the likelihood that other crimes will be committed. Additionally, the bill gives judges an opportunity to sentence certain persons convicted of drug offenses below the

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<sup>4</sup> See UNITED STATES SENTENCING COMMISSION, FEDERAL MANDATORY MINIMUM PENALTIES 2017 OVERVIEW OF MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM, *available at* [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170711\\_Mand-Min.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170711_Mand-Min.pdf).

<sup>5</sup> See UNITED STATES SENTENCING COMMISSION, QUICK FACTS MANDATORY MINIMUM PENALTIES FY 16, *available at* [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick\\_Facts\\_Mand\\_Mins\\_FY16.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Mand_Mins_FY16.pdf).

<sup>6</sup> See generally MARGARET LOVE, ET AL., COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS: LAW, POLICY, AND PRACTICE (2013).

<sup>7</sup> For example, we submitted an amicus brief and offered oral argument in the Sixth Circuit in *United States v. Blewett* in support of that position. Brief for NAACP Legal Defense & Educational Fund, Inc. as Amicus Curiae Supporting Defendants-Appellants, *United States v. Blewett*, 746 F.3d 647 (6th Cir. 2013) (Nos. 12-5226, 12-5582), 2013 WL 5304321.

otherwise-applicable 10-year mandatory minimum sentence to a 5-year mandatory minimum term. We hope the expanded and new safety valves will result in fairer sentences for all criminal defendants, particularly people of color.

### **III. Reduction in Mandatory Minimum Sentences**

LDF appreciates the provisions in SRCA that would reduce the mandatory life sentence for a third drug felony conviction to 25 years, and the mandatory minimum sentence of 20 years for a second drug felony conviction to 15 years. Such reductions will help decrease the unacceptable disparities that result from unnecessarily harsh and inflexible sentencing practices, and reign in the exponential growth of federal prison populations.

Nevertheless, we are dismayed that the bill does not eliminate a single mandatory minimum sentence. Moreover, we are disappointed it creates new mandatory minimum sentences and requires a sentencing enhancement for heroin laced with fentanyl or fentanyl disguised as heroin. Throughout LDF's work on criminal justice reform, we have remained steadfastly opposed to all mandatory minimums and continues to believe that the tough-on-crime movement leading to the imposition of mandatory minimums was ill advised. Sentencing practices such as mandatory minimum terms of imprisonment for low-level and non-violent drug offenses have contributed substantially to the over-incarceration crisis our country now faces.<sup>8</sup>

### **IV. Provisions relating to sentences imposed on youth**

LDF supports the bill's provisions related to young people. Allowing parole opportunities for youth sentenced as adults to prison terms longer than 20 years, including life sentences, is a significant step in the right direction. LDF has litigated extensively to abolish life without parole sentences for children and youth,<sup>9</sup> and appreciates the Senate Judiciary Committee's recognition of young persons' unique characteristics and circumstances, including their capacity for change and rehabilitation, which make them deserving of opportunities to redeem themselves and live productively outside of prison. Qualified youth, however, should have the opportunity for a reduction of their sentence

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<sup>8</sup> NATIONAL RESEARCH COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 73 (Jeremy Travis, Bruce Western & Steve Redburn eds., 2014).

<sup>9</sup> LDF has submitted amicus briefs to the United States Supreme Court, urging abolition of juvenile life without parole sentences. See Brief of Amici Curiae NAACP Legal Defense & Educational Fund, Inc., Charles Hamilton Houston Institute for Race, LatinoJustice PRLDEF, Asian American Legal Defense and Education Fund and Leadership Conference for Civil and Human Rights in Support of Petitioners, *Miller v. Alabama*, 132 S. Ct. 2455 (2012), 2012 WL 135045; Brief for the NAACP Legal Defense & Educational Fund, Inc., Charles Hamilton Houston Institute for Race & Justice, and National Association of Criminal Defense Lawyers as Amici Curiae in Support of Petitioners, *Graham v. Florida*, 560 U.S. 48 (2010), 2009 WL 2197340. LDF also represented the first person in Mississippi to have his juvenile life without parole sentence vacated pursuant to *Miller v. Alabama*. See Agreed Order Vacating Life Without Parole Sentence and Imposing Life with Eligibility for Parole Sentence Pursuant to Miss. Code. Ann. § 47-7-3(1), *Brister v. Mississippi*, Nos. 251-11-696, 12-0-949 (July 26, 2012).

before serving 20 years, should not be limited to only three applications for reductions, and should not be prejudiced by any U.S. attorney decision not to support their application.

LDF also praises SRCA provisions that essentially ban solitary confinement for young people held in federal corrections facilities. This damaging and emotionally traumatizing practice is widespread,<sup>10</sup> and state-based case studies have shown that it tends to disproportionately affect persons of color who are incarcerated.<sup>11</sup> We also applaud provisions requiring the automatic sealing and expungement of certain juvenile court records.

## **V. Proposed improvements to Corrections Act**

LDF supports the bill's attempt to incentivize participation in recidivism-reduction programs by awarding earned time credits in proportion to programming successfully completed. However, we are concerned that persons' eligibility for some of these and other benefits depends on classification by the Bureau of Prisons according to risk level. We are skeptical of the significant subjectivity inherent in that determination and believe that such assessments may lead to racial disparities in risk classification. We note that the assessment system will consider dynamic factors – such as a person's acquisition of new skills and changes in attitude and behavior while incarcerated – that provide incarcerated individuals an opportunity to progress to a lower risk category over time. Nevertheless, we are concerned that the risk assessment will be allowed to consider static factors – such as the community in which a person lived before entering the criminal justice system – which could have a racially disparate impact on who is deemed eligible for recidivism-reduction and re-entry programs. We look forward to working with the Senate and the Department of Justice to develop sufficient constraints on federal officials' discretion, such as standardized objective instruments, to ensure risk classifications are determined fairly and do not have a disparate racial impact.

## **VI. Other necessary criminal justice reforms**

LDF would welcome the addition of other reforms ameliorating the collateral consequences of conviction and imprisonment – for both youth and adults – in any criminal justice reform legislation. We urge Congress to advance federal legislation that provides second chances for individuals with criminal records, including bills requiring the automatic restoration of voting rights, such as the Democracy Restoration Act of 2017, S.1588, and the restoration of federal Pell grant eligibility for persons held in federal and state prisons, such as the Restoring Education and Learning Act.

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<sup>10</sup> See generally HUMAN RIGHTS WATCH & AMERICAN CIVIL LIBERTIES UNION, GROWING UP LOCKED DOWN: YOUTH IN SOLITARY CONFINEMENT IN JAILS AND PRISONS ACROSS THE UNITED STATES (Oct. 2012), available at <https://www.aclu.org/files/assets/us1012webwcover.pdf>.

<sup>11</sup> NEW YORK CIVIL LIBERTIES UNION, BOXED IN: THE TRUE COST OF EXTREME ISOLATION IN NEW YORK'S PRISONS 24 (2012), available at [https://www.nyclu.org/sites/default/files/publications/nyclu\\_boxedin\\_FINAL.pdf](https://www.nyclu.org/sites/default/files/publications/nyclu_boxedin_FINAL.pdf); Margo Schlanger, *Prison Segregation: Symposium Introduction and Preliminary Data on Racial Disparities*, 18 MICH. J. RACE & L. 241, 241-43 (2013).

Additionally, LDF continues to advocate for legislation that eliminates racial bias in policing, such as the End Racial and Religious Profiling Act, S.411, and mandates certain data collection and reporting by law enforcement agencies that receive federal funds to ensure compliance with federal civil rights laws.

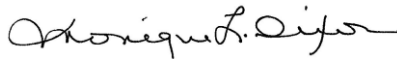
The Senate's consideration of SRCA constitutes significant progress in its multi-year effort to meaningfully improve our criminal justice system. LDF views this bill as a critical step in a long but necessary process. We look forward to working with the Senate on this bill and other legislation to bring about robust and comprehensive criminal justice reform.

If you have any questions, please contact us at 202-682-1300.

Sincerely yours,

A handwritten signature in blue ink, appearing to read "Todd A. Cox".

Todd A. Cox  
Director of Policy

A handwritten signature in black ink, appearing to read "Monique L. Dixon".

Monique L. Dixon  
Deputy Director of Policy & Senior Counsel